Supreme Court, U.S.
FILED
JAN 30 2002
CLERK

(4)

No. 01-966

In the Supreme Court of the United States

FRANK O'BANNON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF INDIANA,
Petitioner,

v.

INDIANA CIVIL LIBERTIES UNION, JOAN LASKOWSKI, ALICE BENNET, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE STATES OF TEXAS, ALABAMA, MISSISSIPPI, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Establishment Clause permits the government to display the Ten Commandments to memorialize the role the Commandments have played in the development of the rule of law and of the American legal system.

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INTEREST OF THE AMICI CURIAE

Texas and other states have monuments on government property displaying the Ten Commandments, as do many local governmental entities in the states. Litigation seeking to remove or stop the erection of these monuments is occurring frequently around the country. Many well-meaning state and local government officials increasingly find themselves between the proverbial rock and a hard place when confronted by views of the monuments' opponents and proponents. The difficulties of this issue are compounded by the existence of conflicting federal- and state-court decisions on just how far governments may go in acknowledging religion as a part of our national heritage through the display on public property of either solely religious or mixed religious and nonreligious symbols.

This Court has not directly spoken on the issue of government accommodation of mixed secular and religious public displays since 1989 in *County of Allegheny v. ACLU*, concerning seasonal holiday displays. Even though the monument here is not a seasonal holiday display, the Seventh Circuit applied *County of Allegheny*, and the Endorsement Test that it adopted, to decide this case. Despite opportunities over the past twelve years, the Court has not revisited *County of Allegheny* in a mixed religious and secular display context. The amici states respectfully submit the Court should revisit *County of Allegheny* and the Endorsement Test by taking this case. Through this case, the Court will provide state and local government officials much-needed guidance and clarification in this specific area of the law, as well as in the wider context of Establishment Clause jurisprudence. To borrow an expression from Justice Scalia, the amici states are urging certiorari be granted in this case so that the Court may "establish the margins of tolerable

diversity" among the lower courts on the frequently recurring issue of Ten Commandment monuments on public property.[1]

SUMMARY OF ARGUMENT

This case presents an important question of national interest, namely: to what extent may government acknowledge religion as being an important part of our Nation's heritage? By taking this case, the Court would provide much-needed guidance and clarification in this unclear, uncertain, and conflicting area of the law.

Indiana's monument in this case passes constitutional muster under the Establishment Clause. The Establishment Clause is elastic enough to permit monuments such as Indiana's, which simply acknowledges or recognizes the important role the Ten Commandments have played in our nation's history and development.

Finally, the Seventh Circuit has departed from the established precedents of this Court by improperly concluding that Indiana's monument violates the Establishment Clause by impermissibly linking the text of the Ten Commandments to the texts of the Preamble to the 1851 Indiana Constitution and the Bill of Rights in the United States Constitution. Under the Seventh Circuit's flawed "impermissibly links" analysis, no monument on government property displaying a religious text or symbol would ever be constitutional. Linkage of religious and secular texts, alone, does not inevitably lead to the conclusion that government is endorsing religion.

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1. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989).

ARGUMENT

I. THE PERMISSIBILITY OF GOVERNMENT DISPLAYS OF THE TEN COMMANDMENTS RAISES A QUESTION OF NATIONAL IMPORTANCE.

There is a debate raging in this country over whether state and local governments may display the Ten Commandments on public property. "What some see as a legal violation, others view as a symbol of our nation's roots." Rob Schmitz, *The Ten Commandments: Religious or Historical Symbol?* (Minnesota Public Radio broadcast, Sept. 10, 2001), *available at* http://news.mpr.org/features/200109/10_scmitzr_laxten-m/index.shtml. Opponents often complain that a monument displaying the Ten Commandments "sends the message that people who adhere to its principles 'are the inside, favored group' . . . and people with other beliefs are outsiders." Joe Garner, *ACLU Sues Over Commandments*, MILWAUKEE J. SENTINEL, May 6, 2001, at 12A, *available at* 2001 WL 9354431. They see the display as a "thinly disguised attempt[] to use government to promote religion" and send a "distinctly Judeo-Christian message." *See* Joshua Hammann, *ACLU Sues State to Stop Ten Commandments at Capitol*, ASSOCIATED PRESS, July 11, 2000, *available at* WESTLAW, ALLNEWSPLUS database, 7/11/00 APWIRES 02:00:00.

On the other hand, supporters may see efforts to remove or block the erection of such monuments as "part of a systematic campaign . . . to denigrate God . . . in public life" and as "attempts to deconstruct the American way of life." *See id.*; John Elvin, INSIGHT MAG., June 7, 1999, at 34, *available at* 1999 WL 8673936. They view such monuments as an "acknowledg[ment] of their religious heritage," Robert E. Meyer, *Some Misunderstand First Amendment*, MILWAUKEE J. SENTINEL, Aug. 11, 2001, at 14A, *available at* 2001 WL 9372349, and as a recognition of the roots of the American justice system. John Hostettler, *The Church/State*

Separation Fallacy, (Aug. 1, 2001), *available at* 2001 WL 5421955. Supporters argue that "the Ten Commandments are as much civic and historic treasures as they are religious," and that the Decalogue is "a code of moral conduct that promotes respect for our system of laws and the good of society." *Display the Ten Commandments: An Important Step in Promoting Morality*, Christian Law Association, *available at* http://www.christianlaw.org/display_10c.html.

The stakes in this debate are high. The importance of the issue in this case goes beyond simply whether government may display the Ten Commandments on a monument on public property. The larger issue is the extent to which government may acknowledge and accommodate religion as being an important part of our nation's heritage. The amici states respectfully urge the Court to intercede and resolve this important issue of national interest in this case. State and local government officials, who are increasingly finding themselves caught in the middle of these two sides, would welcome and be grateful for any clear direction from this Court.

II. THE LAW IS UNCLEAR, UNCERTAIN, AND CONFLICTING ON WHETHER GOVERNMENT MONUMENTS DEPICTING THE TEXT OF THE TEN COMMANDMENTS OFFEND THE ESTABLISHMENT CLAUSE.

The ongoing debate in the American community at large has been reflected in this Court's opinions and the opinions of lower state and federal courts over the past several decades. In a case concerning whether a state statute requiring the posting of the Ten Commandments in public school classrooms violated the Establishment Clause, this Court described the Commandments as an "undeniably . . . sacred text in the Jewish and Christian faiths" that "do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness." *Stone v. Graham*, 449 U.S. 39, 41–42 (1980) (per curiam). Despite the state legislature's stated

purpose in posting the Commandments to recognize them "as the fundamental legal code of Western Civilization and the Common Law of the United States," the Court in *Stone* held that "such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." *Id.*, at 41.

Stone's holding, however, is not so far-reaching that it necessarily bars displays of the Ten Commandments in situations other than their display in classrooms containing impressionable schoolchildren. The Court has "been 'particularly vigilant' in monitoring compliance with the Establishment Clause in that context, where the State exerts 'great authority and coercive power' over students through mandatory attendance requirements." *City of Elkhart v. Books*, 121 S.Ct. 2209, 2211 (2001) (Rehnquist, C.J., dissenting from denial of petition for writ of certiorari). Chief Justice Rehnquist has cautioned that the Court has "never determined, in *Stone* or elsewhere, that the Commandments lack a secular application." *Id.* The Ten Commandments, he has written, "have secular significance, as well, because they have made a substantial contribution to our secular legal codes." *Id.* And "[e]ven *Stone* noted that 'integrated into the school curriculum' the Commandments 'may constitutionally be used in an appropriate study of history, civilization, [or] ethics." *Id.* (quoting *Stone*, 449 U.S., at 42).

Some lower federal courts of appeals and state courts have also noted the various messages the Ten Commandments may transmit. The Seventh Circuit Court of Appeals has acknowledged: "The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by government as playing such a role in our civic order." *Books v. City of Elkhart*, 235 F.2d 292, 302 (CA7 2000). The Tenth Circuit Court of Appeals has stated that "an ecclesiastical background does not necessarily mean that the Decalogue is primarily religious in character—it also has substantial secular attributes." *Anderson v.*

Salt Lake City Corp., 475 F.2d 29, 33 (CA10 1973). And the Colorado Supreme Court has stated that it is a "historical fact the Ten Commandments has served over time as a basis for our national law." *State v. Freedom from Religion Found.*, 898 P.2d 1013, 1024 (Colo. 1995).

As far as this Court is concerned, it appears the question whether the Establishment Clause permits an outdoor monument on government property portraying the Ten Commandments, either alone or with other completely nonreligious words or symbols, is an open one. *See City of Elkhart*, 121 S.Ct., at 2211–12 (Rehnquist, C.J., dissenting from the denial of writ of certiorari). As for the lower state and federal courts, the cases are conflicting. The Colorado Supreme Court and the Tenth Circuit have rejected Establishment Clause challenges mounted against monuments on public property depicting the Ten Commandments along with other nonreligious symbols. *See Anderson*, 475 F.2d, at 34; *Freedom from Religion Found.*, 898 P.2d, at 1026–27. The Seventh Circuit, however, has sustained similar challenges. *See Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (CA7 2001), *at* App. 1a, 13a; *Books*, 235 F.3d, at 308.

The heart of the conflict lies in the lower courts' widely divergent applications of the first two prongs of the test in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). These prongs ask (1) whether the challenged state action has a secular purpose, and (2) whether the primary effect of the state action advances or inhibits religion. *Id.*, at 612. This Court has subsequently recast *Lemon*'s first two prongs by distilling them to mean that government may neither endorse nor disapprove of religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 600–01 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

The endorsement test forbids "government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *County of Allegheny*, 492 U.S., at 593; *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment). In determining whether government's use of an object with religious meaning has the effect of endorsing religion, the question is "what viewers may fairly understand to be the purpose of the display." *County of Allegheny*, 492 U.S., at 595; *Lynch*, 465 U.S., at 692 (O'Connor, J., concurring). Thus, the context in which the government uses a religious symbol is relevant to the endorsement inquiry. *County of Allegheny*, 492 U.S., at 597. And government action is judged "in its unique circumstances to determine whether it constitutes and endorsement or disapproval of religion." *Lynch*, 465 U.S., at 694 (O'Connor, J., concurring); *cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("Our inquiry into this question [whether student-led prayer at varsity football games violates the Establishment Clause] not only can, *but must*, include an examination of the circumstances surrounding the enactment." [emphasis added]). The "history and ubiquity" of a government display of a religious symbol is relevant to the uniqueness of the circumstances. *See County of Allegheny*, 492 U.S., at 625 (O'Connor, J., concurring in part and concurring in judgment); *Lynch*, 465 U.S., at 693 (O'Connor, J., concurring).

The effect of a government practice is evaluated by the objective standard of the reasonable observer. *County of Allegheny*, 492 U.S., at 620; *id.*, at 631 (O'Connor, J., concurring in part and concurring in judgment); *Lynch*, 465 U.S., at 690 (O'Connor, J., concurring). The reasonable observer is deemed to be better informed than a casual passerby. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in judgment). And the perceptions of particular individuals are irrelevant. *Id.* Rather, under the reasonable observer inquiry, the "concern is with the political community writ large." *Id.*; *cf. Good News Club v.*

Milford Cent. Sch., 121 S.Ct. 2093, 2106 (2001) ("We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity. We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might perceive.").

III. INDIANA'S MONUMENT DOES NOT OFFEND THE ESTABLISHMENT CLAUSE.

Given the foregoing standards, a reasonable observer would not perceive Indiana's display of the Ten Commandments with other secular and historical texts or symbols as sending "an '*unmistakable* message' of government support for, or endorsement of, religion" for several reasons. *City of Elkhart*, 121 S.Ct., at 2212 (Rehnquist, C.J., dissenting from denial of petition for writ of certiorari) (emphasis added) (quoting *County of Allegheny*, 492 U.S., at 600). *First*, as already mentioned above, a reasonable observer understands that the Ten Commandments do not transmit a singularly religious message. They convey secular messages as well. "[T]he Decalogue is at once religious and secular." *Anderson*, 475 F.2d, at 33. And the Commandments are "an affirmation of at least a precedent legal code." *Id.* They also reflect "ethical or moral principles" and "are expressions of universal standards of behavior common to all western societies." *Freedom from Religion Found.*, 898 P.2d, at 1024. "[I]t can be said that the last six of the Ten Commandments have counterparts in all known cultures." Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143, 159 (1994). "[T]hese moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution." *Id.* In this sense, the Commandments are not as sectarian and are much

less religiously obtrusive than a creche, *see County of Allegheny*, 492 U.S., at 598, or a Latin cross. *See, e.g., Separation of Church & State Comm.*, 93 F.3d 617 (CA9 1996) (per curiam).

In sum,

> "[i]t is axiomatic that many of the principles contained in the Ten Commandments are fundamental to the Western legal tradition. Prohibitions on murder, theft, and perjury are found in nearly every legal code. Notions of respect for one's parents and admonitions against adultery are also implicit, if not explicit, in the quasi-legal realm of normative rules that order many societies. Few people, if any, would dispute that the Ten Commandments . . . inform our notions of right and wrong and, as such, have influenced the development of Western law of which the American legal system is a part." Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J. L. & RELIGION 525, 525 (1999–2000); *see also* Berman, *Law and Logos*, 44 DEPAUL L. REV., at 159–60 (noting that Ten Commandments' "injunctions are primarily moral, yet they also have social and a legal dimension").

This fact is reinforced by the presence of two undeniable secular texts on Indiana's monument: the Bill of Rights from the United States Constitution, and the Preamble to the 1851 Indiana Constitution. Taken together in context, the message is unmistakable that these texts are foundational aspects of Indiana's government and values. A reasonable observer, being well-informed of the United States and Indiana history, would perceive this.

Second, considering the larger context of the entire capitol grounds, other statues and monuments, honoring as they do important historical events and persons, combine with the

challenged monument to celebrate Indiana's rich history. In considering the monument here, the Seventh Circuit focused too narrowly on the Ten Commandments when the capitol grounds has many other objects, each with its own "focal point" and historical message. *County of Allegheny*, 492 U.S., at 598 (discussing the display in *Lynch* that "composed a series of figures and objects, each group of which had their own focal point"). Just as the seasonal holiday display in *Lynch* contained other items besides the creche that took the focus off of the religious aspect of the creche and put it into the context of the origin of the holiday season, the other objects on the statehouse grounds place the Ten Commandments in a larger historical context, instead of simply a narrow, sectarian context.

Third, contrary to the Seventh Circuit's belief, having the three texts on different sides of this block monument and having larger lettering for the Commandments, making it more easily viewed from a distance, does not lead a reasonable observer to conclude Indiana is endorsing religion. As in the larger context of the capitol grounds, the reasonable observer inquiry does not allow for such a narrow focus. Unlike a casual passerby, a reasonable observer takes into account each aspect of the monument and all of its texts. *See Pinette*, 515 U.S., at 779 (O'Connor, J., concurring in part and concurring in judgment). Also, the Preamble to the 1851 Indiana Constitution and the Bill of Rights each have their own focal point and story to tell. The Ten Commandments do not stand alone and thus send only one unmistakable message endorsing religion. *See County of Allegheny*, 492 U.S., at 598.

Fourth, having secular texts on the same monument as the text of the Ten Commandments does not lead to the unmistakable conclusion that the three texts are linked in such a way that Indiana is endorsing religion. Rather, an observer would reasonably believe that the "reason or effect" of the secular texts "happen[] to coincide or harmonize with the [religious] tenets" expressed by the Ten

Commandments. *See Lynch*, 465 U.S., at 682. The amici states further discuss this facet of the Seventh Circuit's decision in Part V, below.

IV. THE COURT SHOULD GRANT THE WRIT TO CLARIFY WHETHER GOVERNMENT MAY ACKNOWLEDGE RELIGION'S ROLE AS A FOUNDATIONAL ASPECT OF OUR NATION'S LAWS AND HERITAGE.

"[I]t has never been thought possible or even desirable to enforce a regime of total separation between religion and government." *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 760 (1973). The overarching principle animating the Establishment Clause is government neutrality towards religion. *See Wallace*, 472 U.S., at 60. That is, government cannot favor religion over nonreligion, and it cannot favor one religion over another. *See Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963). At the same time, government cannot "show a callous indifference to religious groups" because "[t]hat would be preferring those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1946) (stating the "First Amendment requires the State to be a neutral in its relations with groups of religious believers and non-believers; it does not require the State to be their adversary"). As Justice Goldberg wrote in *Abington School District v. Schempp*,

> "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the

> fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings Government must inevitably take cognizance of the existence of religion." 374 U.S., at 306 (Goldberg, J., concurring).

The Court has also recognized that complete separation between government and religion "'is not possible in an absolute sense'" and that "'[s]ome relationship between government and religious organizations is inevitable.'" *Lynch*, 465 U.S., at 672 (quoting *Lemon*, 403 U.S., at 614). "Nor does the Constitution require complete separation of church and state; it affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility towards any." *Id.*, at 673 (emphasis added); *see also County of Allegheny*, 492 U.S., at 657 (Kennedy, J., concurring in judgment and dissenting in part) ("Government policies of accommodation, acknowledgment, and support of religion are an accepted part of our political and cultural heritage."). The Establishment Clause is elastic enough to "permit[] government some latitude in recognizing and accommodating the central role religion plays in our society." *County of Allegheny*, 492 U.S., at 657 (Kennedy, J., concurring in judgment and dissenting in part). Through accommodation, government shows "respect to the religious nature of our people." *Zorach*, 343 U.S., at 314. In sum, the amici states believe that between the two extremes of government endorsement of religion and government hostility against religion, there lies a zone in which government may recognize or acknowledge the important foundational role religion has played in our nation's laws and history.

This zone explains why monuments and public buildings in our nation's capitol may depict religious symbols and words. The apex of the Washington Monument, for example, is inscribed with the Latin phrase Laus Deo—"Praise be to God"—on the aluminum tip

of its capstone. LOUIS TORRES, "TO THE IMMORTAL NAME AND MEMORY OF GEORGE WASHINGTON": THE UNITED STATES ARMY CORPS OF ENGINEERS AND THE CONSTRUCTION OF THE WASHINGTON MONUMENT 82–84 (U.S. Gov't Printing Office, 1985). Also, the entrance to the National Archives Building displays a bronze medallion of the Ten Commandments surrounded by four winged figures representing Legislation, Justice, History, and War and Defense. Chuck Donovan & Christina Darnell, *Hallowed Ground: Washington's Monuments to Faith, Family and Freedom*, Family Research Council, *available at* http://www.religiousliberty.com/article (last visited Jan. 10, 2002). Depictions of Moses holding the Ten Commandments are even displayed at the Supreme Court Building. *County of Allegheny*, 492 U.S., at 652 (Stevens, J., concurring in part and dissenting in part).

It would be ludicrous to suggest that these and all other religious words and symbols on national monuments and buildings must be removed because they violate the Establishment Clause. If the federal government may display such words and symbols, the states should be permitted to display similar objects. There is no principled reason why the federal government may exhibit such displays, but state and local governments cannot.

Despite this Court's recognition of the concept of accommodation concerning the religion clauses of the First Amendment, the contours and features of the concept are obscure. In *County of Allegheny*, the various opinions reflected divergent views as to how accommodation operates under the Establishment Clause and whether it even applies to government display of religious symbols. Justice Blackmun, writing for the Court, stated that "an accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden *on the exercise of religion*," *County of Allegheny*, 492 U.S., at 613 n.59 (emphasis in original) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327,

348 (1987) (O'Connor, J., concurring in judgment)), and that "[t]he display of a creche in a courthouse does not remove any burden on the free exercise of Christianity." *Id.*, at 601 n.51. Justice Kennedy, joined by Chief Justice Rehnquist, and Justices Scalia and White, wrote that

> "[c]ontrary to the assumption implicit in this analysis, however, we have never held that government's power to accommodate and recognize religion extends no further than the requirements of the Free Exercise Clause. To the contrary, '[t]he limits of permissible state accommodation to religion are by no means coextensive with the non-interference mandated by the Free Exercise Clause.'" *Id.*, at 663 n.2 (Kennedy, J., concurring in judgment in part and dissenting in part) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970)); *cf. Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting).

Despite the apparent disagreement amongst the members of this Court in *County of Allegheny*, the majority seemingly did not reject the notion that some amount of government accommodation of religious displays may be appropriate. Justice Blackmun, carefully limiting his comments to the facts in *County of Allegheny*, wrote:

> "One may agree with Justice KENNEDY that the scope of accommodations under the Establishment clause is larger than the scope of accommodations mandated by the Free Exercise Clause. . . . But a category of 'permissible accommodations of religion not required by the Free Exercise Clause' aids the creche on the Grand Staircase not at all." *County of Allegheny*, 492 U.S., at 613 n.59.

Given the Court's statements in *Lynch* about accommodating religion, 465 U.S., at 683, and the less-than-definitive explication of what accommodation means under the Establishment Clause in *County of Allegheny*, it should not be surprising that state and local

governments around the country increasingly find themselves litigating whether a monument on government property displaying the Ten Commandments violates the Establishment Clause. *See, e.g., Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (CA7 2001); *Books*, 235 F.2d , at 292; *Anderson*, 475 F.2d, at 29; *Adland v. Russ*, 107 F.Supp.2d 782 (E.D. Ky. 2000); *Freedom from Religion Found.*, 898 P.2d, at 1013. *See generally* Freedom from Religion Foundation, Action Alert (Sept. 5, 2001), *at* http://www.ffrf.org/action/10comm.html (last visited Jan. 5, 2002) (Internet web site urging persons to protest Ten Commandment monuments on state property in Alabama, Arizona, and Texas). As a consequence, government officials find themselves "struggling with how [their] oath of office to uphold the Constitution fits with" permitting such monuments to be displayed on government lands. *See* Schmitz, *supra*. Thus, the amici states are keenly interested in the Court granting certiorari in this case so that much-needed clarification and guidance may be provided to government officials to aid them in navigating the stormy sea between the proscriptions against endorsement of religion and hostility against religion.

V. THE SEVENTH CIRCUIT'S "IMPERMISSIBLY LINKS" ANALYSIS IS CONTRARY TO THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE.

The Seventh Circuit mistakenly held that the presence of other, secular texts—namely, the Bill of Rights of the United States Constitution and the Preamble to the 1851 Indiana Constitution—on the same monument as the text of the Ten Commandments "impermissibly links religion and law," making the monument unconstitutional under the Establishment Clause. *See O'Bannon*, 259 F.3d, at 773. This conclusion is contrary to the Court's jurisprudence about the role context plays in establishing whether displays containing religious words or symbols violates the Establishment Clause.

In *Lynch*, this Court held that the inclusion of a creche in the context of a seasonal holiday display did not violate the Establishment Clause. *See* 465 U.S., at 684. In describing the overall holiday setting in that case, Justice O'Connor wrote that

> "[a]lthough the religious and indeed sectarian significance of the creche . . . is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion." 465 U.S., at 692 (O'Connor, J., concurring).

Similarly, in this case, although the secular texts on Indiana's proposed monument do not eliminate the religious significance of the Ten Commandments, they nevertheless do negate any message of endorsement of religion. As already mentioned above, a reasonable observer, viewing the monument in context, would conclude that the Ten Commandments played some foundational role in the laws of Indiana and the United States. A reasonable observer would not believe that Indiana was endorsing religion.

Indeed, far from endorsing religion, the monument's display of the Ten Commandments is merely an "acknowledgment" of the role of the Ten Commandments in the development of law. As Justice O'Connor concluded in *Lynch*,

> "the government's display of the creche in this particular physical setting [is] no more an endorsement of religion than such governmental 'acknowledgments' of religion as legislative prayers of the type approved in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), government declaration of Thanksgiving as a public

> holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable court.'" *Id.*, at 693 (O'Connor, J., concurring).

The same reasoning applies to Indiana's monument in this case. Because it is a mere "acknowledgment" of religion, it does not endorse religion and does not violate the Establishment Clause.

The Seventh Circuit's holding that the Indiana monument "impermissibly links" religion and law[2] cannot be squared with *Lynch*, *Marsh*, and *County of Allegheny*. The Seventh Circuit appears to believe that any "link" between religion and law or government violates the Establishment Clause. That is simply not true. If it were, the Court would not have approved the legislative prayers in *Marsh*. Although such prayers undoubtedly "linked" religion and law, they did not violate the Establishment Clause because they did not amount to a governmental endorsement of religion. Instead, they were a mere acknowledgment of religion. *See Lynch*, 465 U.S., at 692–93 (O'Connor, J., concurring). The same is true of Indiana's display of the Ten Commandments.

Similarly, although the creche in the *Lynch* holiday display and the menorah in the *County of Allegheny* holiday display could be said to have "linked" religion and the government's celebration of a secular holiday, they, too, in the context of their physical settings,

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2. The Seventh Circuit has used its "impermissibly links" test to invalidate the display of another Ten Commandments case. *See Books*, 235 F.3d, at 306–07 (holding that the presence of an American eagle gripping the national colors at the top of a monument containing the text of the Ten Commandments "specifically links religion . . . and civil government," and holding that the proximity of the monument to the municipal building, above the door of which were inscribed the words "Dedicatum Justitia," gave the impression that "the only 'law' displayed for doing justice is the monument bearing the Ten Commandments").

conveyed no message of endorsement of religion. *County of Allegheny*, 492 U.S., at 620–21; *Lynch*, 465 U.S., at 693 (O'Connor, J., concurring in judgment). Under the Seventh Circuit's reasoning, *Lynch*, *Marsh*, and *Allegheny* would have come out differently.

If the Seventh Circuit's holding were the law, then few, if any, government displays containing items with religious significance could ever pass constitutional muster. If a religious text or object appeared by itself, it likely would lack the context necessary to avoid conveying a message of endorsement. But if it appeared together with secular texts or objects, under the Seventh Circuit's reasoning, the display as a whole would "impermissibly link" religion with the character of the secular items, thereby violating the Establishment Clause. In essence, the Seventh Circuit seems to believe that the mere juxtaposition of a religious and a secular text or object related to government makes a display unconstitutional as a matter of law, neglecting to employ the Court's endorsement test and ignoring the Court's practice of conducting "case-specific examinations of the challenged government action." *County of Allegheny*, 492 U.S., at 623 (O'Connor, J., concurring).

The Seventh Circuit's "impermissibly links" analysis, if adopted, would essentially eliminate all displays containing some religious aspect. All traces of religion would have to be purged from government property—including monuments that have stood for decades and carry concomitant historical and cultural significance. That result would fly in the face of the Court's intent to "avoid[] drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion." *Id.* To avoid this unwarranted logical progression, the Court should grant certiorari in this case and hold that a mere "link" between religion and law, justice, or some other

concept related to government does not violate the Establishment Clause.

CONCLUSION

For these reasons, the amici states respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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